

[APPELLATE CIVIL JURISDICTION]
HUGGARD, C.J., BURTON & MUDIE, JJ.

May 16, 1934.

A. SUBRAMANIAM.....Appellant
vs.

S. M. R. M. MUTHIAH CHETTY....Respondent

[SELANGOR CIVIL APPEAL No. 4 of 1934]

*Land Code, 1926, section 237—Procedure—
Appeal against decision of Collector.*

A party dissatisfied with the decision of the Collector must take the remedy of appeal under section 237 of The Land Code, 1926, if it is open to him, and if he fails to do so he must be taken to acquiesce in the order.

Even where a Collector whilst acting within his powers, made mistakes in the application of the law, the remedy of a dissatisfied party is confined to an appeal under the provisions of section 237 of the Land Code.

Decision of Thomas, C.J. affirmed.

C. Mills for the appellant.

W. G. W. Hastings for the respondent.

Cur. Ad. Vult.

The judgment of the Court of Appeal, Sir Walter Huggard (C.J., Straits Settlements), Burton, J. and Mudie, J., was delivered on 16th May, 1934, by:—

BURTON, J.—This is an appeal from a decree of Thomas, C. J., refusing a declaration that the sale of the plaintiff's lands which took place on 3rd November, 1932, at the instance of defendant as chargee was a nullity and vested no rights in the defendant. The sale was held under two orders, one of 2nd July, 1931, and one of 9th August, 1932. There seems to be no doubt that both these orders were bad and would have been set aside if an appeal had been lodged against them. But the plaintiff did not appeal, and he now brings this suit in which he seeks to set aside the sale consequent upon these orders because of the badness of these orders.

The defendant started proceedings for the sale of this land under the charge on 30th August, 1929, and the Collector made an order of sale on 28th February, 1930, fixing the sale for the 17th April and appointing separate reserve prices for the separate pieces of land. This order was never proceeded with, and on 2nd June, 1931, the Collector referred the matter to the State Council for permission to sell under the Small Holdings (Restriction of Sale) Enactment, 1931. He then made another order dated 2nd July, 1931, fixing a lump sum up-set price of \$30,000/- and ordering the sale for 6th August, 1931. This order was drawn up in the form of Schedule XXXII and purports to be made under section 142 of the Land Code. No order from the State Council had been received, but the land was put up for sale on 6th August and no bids were received. There is no doubt I think that the order of 2nd July would be held to be bad. On 27th October, 1931, the State Council made an order permitting the sale, and on 13th February, 1932, the Collector again made an order in the form of Schedule XXXII fixing a date of sale and a lump sum reserve price of

\$100/-. This order was appealed against, and the sale did not take place. The order of the 15th February, 1932, was similar in all respects to the order of 2nd July, 1931. The Court of Appeal held this order bad; the judgment uses the following words:—

“Upon the matter coming before him, the learned Judge was of the opinion that the order appealed against was a bad order, and in my view, he should have so decided and declared the order a nullity.”

The order was held bad because, as Thorne, J., said:—

“In my opinion having once acted under the provisions of that section, the Collector becomes *functus officio* as to these two matters, namely the amount due under the charge, and the consideration of the question as to whether a sale be ordered or not. Any matter which may thereafter arise under and in pursuance of the order for sale can only be dealt with by the Collector under section 145 and the following sections.”

After this decision of the Court of Appeal the Collector made an order on 9th August, 1932, which though purporting to be made under section 145 again offends against the decision of the Court of Appeal. The sale was fixed for 3rd November, 1932, and the land was knocked down to the defendant at the reserve price of \$100/-. The plaintiff now says this sale was bad because of the badness of the orders upon which it was based.

The sole question in this appeal is whether the plaintiff can now obtain a declaration setting the sale aside, or whether he is debarred from obtaining such a declaration because he has failed to appeal against the orders directing the sale. His right of appeal is governed by section 237 of the Land Code, which limits his right of appeal to thirty days from the time of the order. It has been argued that section 237 is an enabling section, but I am not clear what that argument means. It certainly enables a dissatisfied party to appeal, but I do not think that it can be read to mean that a dissatisfied party may adopt that procedure if he wishes but may equally well adopt some other procedure. In *Taylor v. Taylor*, (1875) 1 Ch. D. 426, at page 431 Jessel, M.R. says:—

“It appears to me that the 16th section though in form merely enabling, is in fact the only enabling part which entitles the Court to set the Act in motion. When a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted. For instance, the 16th section says that the proceeding is to be by petition. It is enabling, I know, in form, that the application may be by petition; but no other process can be

adopted. That has been decided on a great variety of Acts where the application has been directed to be by petition, and it has been laid down that that being the mode pointed out by the Act which conferred the jurisdiction, you must exercise the jurisdiction (as the 2nd section of this Act says in terms, though it was not necessary) according to the provisions of the Act."

I am of opinion that the dissatisfied party must take the remedy of appeal under section 237 if that is open to him, and that if he fails to appeal he must be taken to acquiesce in the order. Otherwise by instituting a declaratory suit he attempts to obtain the same result as he would by appealing but evades the time limit prescribed by section 237; and we get the intolerable position that an auction purchaser has no security of title till the expiry of the limitation period, that the chargor who has discovered a flaw need not appeal and set the order aside but may lie by and use his knowledge at any time within the limitation period to set aside a sale of which he may not approve for other reasons. The root principle of the Torrens system is that the Register should be a mirror of title and that a purchaser should not have to search beyond the title. But no prospective purchaser would have the right to see these orders, and if he saw them, he would not be able to conclude that they are bad without going through the whole record of the case before the Collector which lasted over two years and considering every step. And in many cases the decision as to whether or not an order is bad would not be such an easy matter as it appears in this case. Yet even in this case there is nothing on the face of either of these orders by which an intending purchaser could see that they are bad.

But it was also argued that these orders were nullities, as made without jurisdiction, and that consequently it is not necessary to set them aside. There is no doubt that in the case of inferior jurisdictions unless sufficient appears on the face of the proceedings themselves to show that the jurisdiction exists, the proceedings are void (see *Taylor v. Clemson*, (1842) 2 Q.B. 978). On the other hand where an order, on the face of it good, is made by a competent authority, it must be deemed to be good until it is set aside by whatever procedure may be prescribed or allowed by law. In this case the orders complained of are on the face of them good; and in the case of *Home v. Earl Camden*, 2 H. Bl. 533; 126 E.R. 687, at page 536, Eyre, C.J., says:—

"It must be admitted that the misinterpretation of either the common or statute law in a proceeding confessedly within the jurisdiction of these Courts, and where they are bound to exercise their judgment upon one or the other, seems to be rather a matter of error, to be redressed in the course of the appeal which the

law has provided, than a ground for prohibition."

These words seem to me exactly applicable to the present case. The Collector has confessedly acted within his powers but has made a series of blunders in the application of the law. The remedy of the plaintiff was appeal. He did not take that remedy, and I think he must be taken to have acquiesced in the orders and that it is too late for him to question the orders now.

I think the appeal should be dismissed with costs.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

May 16, 1934.

HOWES, J.

CHIN TIN CHIN.....Appellant
vs.

PUBLIC PROSECUTOR.....Respondent

[PERAK MAGISTRATE'S CRIMINAL APPEAL

No. 16 of 1934]

Common Gaming Houses Enactment, 1912, Sections 2, 4 (i) (d) and 8A—Public lottery—Sale of tickets in a private lottery to the public.

The Common Gaming Houses Enactment, 1912, is aimed (*inter alia*) at the suppression of public lotteries and it cannot have been the intention of that Enactment to suppress private lotteries.

The sale of tickets in a private lottery to the public does not thereby change such lottery into a public one, and consequently the seller cannot be convicted of selling tickets in a public lottery.

J. Dunford Wood for the Appellant.

L. C. Simpson-Gray, Deputy Public Prosecutor, for Respondent.

HOWES, J.—In this appeal the charge against the accused was that he "on or about 11-30 a.m. on 25.11.33 at the Overseas Bank, Ipoh, did sell seven lottery tickets, an offence under Sec. 4 (i) (d) of Enactment No. 19/1912," which reads as follows:—

"4 (i) Whoever—

.....
(d) receives directly or indirectly any money or money's worth for or in respect of any chance in any event or contingency connected with a public lottery or sells or offers for sale or gives or delivers any lottery ticket;

"shall be punishable with a fine not exceeding three thousand dollars or with imprisonment of either description for a period not exceeding twelve months."

The second portion of the sub-section creates the offence of which the accused was convicted.

"Lottery ticket" as defined in section 2 (i) "includes any paper.....which either expressly or tacitly entitles or purports to entitle the holder or any other person to receive any money or money's worth on the happening of any event or contingency connected with any public lottery."